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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

July 1, 1996

By Hand

Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: CC Docket No. 92-297
Local Multipoint Distribution Service

Dear Chairman and Commissioners:

On behalf of CellularVision USA, Inc.¹ ("CellularVision"), the recognized global pioneer of the wireless, broadband Local Multipoint Distribution Service ("LMDS") technology, and currently the only commercially licensed LMDS provider in the United States, we are writing to reiterate the irrefutable legal and equitable bases supporting the Commission's previous unanimous votes in December 1992 and just eleven months ago in July 1995 awarding a tentative pioneer's preference to CellularVision, previously named Suite 12. Since the initial grant to CellularVision four years ago of a tentative pioneer's preference and since the Commission's follow-up vote reaffirming that original grant as part of its unanimous adoption of the Third NPRM,² nothing has been introduced in the Commission's voluminous, five-year-old 28 GHz

¹ CellularVision is publicly traded on the NASDAQ National Market System under the symbol "CVUS."

² See In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, CC Docket No. 92-297, FCC 95-287 (released July 28, 1995) ("Third NPRM").

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Rulemaking Record which alters the Commission's reasoned determination to grant CellularVision a pioneer's preference for its singular leadership role in bringing the exciting, versatile LMDS technology to the U.S. communications marketplace.

To the contrary, events in the past 11 months have merely served to reinforce the fact that CellularVision's principals justifiably earned the Commission's appropriate and frequently cited recognition³ for its important and tenacious pioneering efforts spanning a decade to develop and refine LMDS as a competitive two-way video, voice and data service alternative, promising immediate competition to cable systems and traditional telcos. In Canada, in Russia, throughout Latin America — governments have moved more quickly than the Commission and are now granting operating licenses in the 28 GHz band for CellularVision's pioneer LMDS technology — a technology which when licensed nationwide by the FCC through LMDS spectrum auctions in the 28 GHz band will:

- provide consumers with an immediate, high quality competitive choice in all forms of communications services
- offer educational institutions like the pro-LMDS University of Texas with an affordable means for effectuating distance learning goals
- provide small businesses the real opportunity to participate in today's communications marketplace explosion through the ownership and/or operation of LMDS systems, a possibility noted repeatedly in the record in this proceeding by the Clinton Administration's Small Business Administration⁴

³ See Third NPRM, paras. 68-73; Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, ("First NPRM"), 8 FCC Rcd 557 (1993), paras. 57-65; In re Application of HYE CREST MANAGEMENT, INC., For License Authorization in the Point-to-point Microwave Radio Service in 27.5 - 29.5 GHz Band and Request for Waiver of the Rules, 6 FCC Rcd 332 (1991), paras. 18, 24.

⁴ See Ex parte filing, Chief Counsel for Advocacy, United States Small Business Administration, CC Docket No. 92-297, filed June 8, 1995; Comments of the Chief Counsel for Advocacy of the United States Small Business Administration in Support of the Motion to Proceed by CellularVision, CC Docket No. 92-297, February 14, 1995, pages 4-5; Comments of the Acting Chief Counsel for Advocacy of the United States Small Business Administration on the Second Notice of Proposed Rulemaking,

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- create major equipment markets for resilient defense contractors like Titan Information Systems and M/A-Com, Inc., as well as for small business starts-ups like mm-Tech, Inc., who have invested significant resources to develop and supply LMDS equipment both in the U.S. and to the burgeoning global market
- generate billions of deficit reducing dollars for the Federal Treasury from the nationwide auctioning and licensing of LMDS, hopefully in calendar year 1996.

All of these and other important public interest benefits are directly and exclusively the result of the creativity, tenacity and financial commitment over a ten-year period of CellularVision's principals Shant Hovnanian, CellularVision's CEO, his father, Vahak Hovnanian and inventor Bernie Bossard. Importantly, the enormous record before the Commission in the highly contentious and protracted 28 GHz Rulemaking contains not one word challenging the fact that these three entrepreneurs are the sole pioneers of the wireless LMDS technology that the Commission is finally poised to license nationwide through spectrum auctions.

Based on the voluminous and uncontested record before the Commission on the issue of CellularVision's pioneer's preference and in view of the fact that CellularVision is the Commission's only tentative pioneer's preference awardee remaining in the group of six 1992 tentative awardees — the tentative grants to the other five have been finalized in rulemakings appropriately concluded long ago⁵ — the Commission has no defensible and legally sustainable basis not to finalize its two prior tentative awards of a pioneer's preference to CellularVision as part of its adoption of a Report and Order in the 28 GHz Rulemaking.

Importantly, as the Commission itself recognized in the Third NPRM in this proceeding, the rules governing the Commission's evaluation of CellularVision's pioneer's preference request "are those that were in effect when the Tentative

CC Docket No. 92-297, March 28, 1994.

⁵ See e.g., Report and Order, ET Docket No. 91-280, 8 FCC Rcd 1812 (1993) (awarding NGSO/MSS pioneer's preference license to VITA); and First Report and Order, 8 FCC Rcd 7162 (1993) (awarding Narrowband PCS pioneer's preference license to Mtel); and Third Report and Order, GEN Docket No. 90-314, 9 FCC Rcd 1337 (1994) (awarding Broadband PCS pioneer's preference licenses to APC, Cox and Omnipoint).

Decision was adopted."⁶ Further, the Commission has recognized that the new pioneer's preference evaluation criteria mandated by Congress in the General Agreement on Tariffs and Trade ("GATT") explicitly "will not apply to proceedings in which tentative decisions have been made."⁷

Nothing — nothing in terms of a judicial ruling, nothing in terms of an enacted legislative mandate and nothing in the FCC's record supports any action by the Commission other than the final award of CellularVision's twice-tentatively granted pioneer's preference. In the Third NPRM, the Commission, recognizing that CellularVision already holds a commercial license to serve the New York Primary Metropolitan Statistical Area ("PMSA"), stated that "if a pioneer's preference is awarded for the remainder of the BTA, Section 309(j)(13)(B) of the Communications Act, requiring an 85 percent payment of the value of the pioneer's preference license, would apply only to the portion of the New York BTA not covered by CellularVision's existing license for the PMSA."⁸ Thus, the pioneer's preference tentatively awarded to CellularVision no longer is a free license grant as it was proposed in 1992, but, consistent with the GATT legislation and as proposed by the Commission in the Third NPRM, provides merely a 15% reduction in the equivalent auction price that CellularVision's principals will pay for the outer portion of the New York Basic Trading Area not currently covered by CellularVision's existing commercial license for the New York PMSA granted by the FCC in 1991.⁹

Regardless of any policy debate which may or may not occur in the future

⁶ Third NPRM, para. 70. In this regard, when the Commission adopted amendments to its pioneer's preference criteria in 1994, it "explicitly held that they would not apply to proceedings in which tentative decisions had been issued." *Id.*, note 76.

⁷ Third Report and Order, ET Docket No. 93-266, 10 FCC Rcd 13183 (1995), para. 24.

⁸ Third NPRM, para. 70.

⁹ See Third NPRM, para. 70. The Commission's proposal in the Third NPRM to apply the 15% discount to CellularVision's pioneer's preference is consistent with its earlier statement that "the payment provisions of the GATT legislation will apply to any and all licenses ultimately issued in the future resulting from a pioneer's preference, including any license based on a preference granted in CC Docket No. 92-297." Third Report and Order, ET Docket No. 93-266, 10 FCC Rcd 13183, para. 24 (emphasis added).

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concerning the Commission's prospective use of pioneer's preferences, the Commission is bound in the instant case by the overwhelming and unequivocal record that the Commission itself has developed supporting its two prior grants of tentative pioneer's preferences to CellularVision. Further, the Commission must take note of the central fact that CellularVision is legally distinct from the 13 pending pioneer's preference applicants whose requests have not even matriculated to the tentative pioneer's preference grantee status that CellularVision achieved in 1992 and again in July 1995.

Now, ten years after CellularVision's principals commenced their challenging adventure to deploy their LMDS technology in the unused 28 GHz band as a competitive interactive video, voice and data service for consumers in the United States, it is time for the Commission to confirm what it has twice already tentatively granted, and award in the Report and Order in the 28 GHz Rulemaking CellularVision the pioneer's preference that the Commission offered and CellularVision clearly earned.

Failure by the Commission to act in accord with its own record in the 28 GHz Rulemaking would cause acute harm to CellularVision and its shareholders, and would be so arbitrary and capricious as to trigger further delay in the nationwide licensing of LMDS through auctions — auctions which will finally lead to the robust competitive use of the now fallow yet enormously valuable 28 GHz spectrum.

Sincerely,



Michael R. Gardner
Counsel for CellularVision USA, Inc.

cc Blair Levin
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William F. Caton, 28 GHz Rulemaking Record